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No. 93-7407

In The

Supreme Court of the United States

October Term, 1993

ROBERT O'NEAL,

Petitioner,

vs.

FRED McANINCH, WARDEN,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

WHEN A PETITIONER HAS ESTABLISHED A CONSTITUTIONAL VIOLATION IN A FEDERAL HABEAS ACTION, DOES THE STATE HAVE THE BURDEN OF PROVING THE ERROR WAS HARMLESS UNDER *BRECHT V. ABRAHAMSON*, 113 S. Ct. 1710 (1993)?

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OPINIONS BELOW

The decision of the United States Court of Appeals for the Sixth Circuit is reported. *O'Neal v. Morris*, 3 F.3d 143 (6th Cir. 1993) (Joint Appendix (hereinafter J.A.) 217-29). The entry of the Court of Appeals denying rehearing and suggestion for rehearing *en banc*, (J.A. 230), is not reported.

The judgment and opinion of the United States District Court for the Southern District of Ohio, Western Division, (J.A. 211-16), the Magistrate's Supplemental Report and Recommendation, (J.A. 200-12), the district court's original remand order, (J.A. 191-99), and the Magistrate's Report and Recommendation, (J.A. 99-190), are unreported.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on August 20, 1993. (J.A. 217.) The order of the Court of Appeals denying O'Neal's petition for rehearing and suggestion for rehearing *en banc* was entered on October 4, 1993. (J.A. 217, 230.) The petition for certiorari was timely filed on January 3, 1994, and was granted on April 4, 1994.

The Court's jurisdiction rests upon 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

This case involves the Fourteenth Amendment to the Constitution of the United States, which provides in pertinent part:

FOURTEENTH AMENDMENT

> SECTION I. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall

make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTES INVOLVED

Ohio Revised Code Annotated, Section 2903.01 – Aggravated Murder

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STATEMENT OF THE CASE

A. Procedural History

Dimple Podborny, Lloyd Allen, and Petitioner Robert O'Neal (hereinafter O'Neal), were tried jointly and found guilty, in October 1981, of the kidnapping (Ohio Revised Code Annotated (hereinafter O.R.C.) Section 2905.01), aggravated robbery (O.R.C. Section 2911.01), and aggravated murder (O.R.C. Section 2903.01) of Henry Podborny. After exhausting his state remedies on appeal to the Cuyahoga County, Ohio Court of Appeals and the Supreme Court of Ohio, O'Neal filed a *pro se* petition for a writ of habeas corpus, pursuant to 28 U.S.C. § 2254, in the United States District Court for the Southern District of Ohio, Western Division, on September 24, 1986. (J.A.

1.) The District Judge assigned the case to a Magistrate who appointed counsel on August 22, 1988. (J.A. 1.) The Magistrate held an oral argument on July 27, 1990 and an evidentiary hearing on February 19, 1991. On January 22, 1992, the Magistrate issued his Report and Recommendation finding the jury instructions on intent were constitutionally defective, and that prosecutorial misconduct and erroneously admitted evidence deprived O'Neal of a fundamentally fair trial. (J.A. 161-62.)

Upon review of the Report and Recommendation, the District Court remanded the case to the Magistrate for further review on the jury instruction issue. (J.A. 191-99.) The Magistrate issued a Supplemental Report and Recommendation reaffirming that a new trial was mandated. (J.A. 200-10.) The District Court adopted both reports. (J.A. 211-16.)

Respondent (hereinafter the State) appealed to the United States Court of Appeals for the Sixth Circuit and obtained a stay of the new trial order. While the State's appeal was pending, this Court issued its decision in *Brecht v. Abrahamson*, 113 S. Ct. 1710 (1993). (J.A. 1.) Without benefit of briefing on the impact of *Brecht*, the Sixth Circuit held that O'Neal had the burden of proving the constitutional error was not harmless. *O'Neal v. Morris*, 3 F.3d 143 (6th Cir. 1993). (J.A. 221.) The Sixth Circuit concluded that the constitutional errors resulting from the jury instructions and prosecutor's closing argument were harmless. *Id.* at 147. (J.A. 227-29.) O'Neal's timely Petition for Rehearing with Suggestion for Rehearing *En Banc* was denied on October 4, 1993. (J.A. 1, 230.)

B. Trial Facts And Lower Court Rulings

This case involves the kidnapping, aggravated robbery, and aggravated murder of Henry Podborny and the

conspiracy to commit those acts. As a result of constitutionally defective jury instructions, erroneously admitted evidence, and egregious prosecutorial misconduct, O'Neal was wrongfully convicted of these crimes.

The events leading to the commission of these crimes began with the 1980 separation of Henry and Dimple Podborny of Chicago, Illinois. (Tr. 5350-51.) Shortly after the separation, Dimple began receiving threats, believed to be delivered at the direction of her husband, Henry. (Tr. 5315, 5321-22, 5349.) Turning to her daughter-in-law, Gail Toney, Dimple asked for assistance in hiring someone to provide protection. (Tr. 1762-63, 5349-50) (J.A. 7.)

Recognizing an opportunity to defraud her mother-in-law, Toney contacted James McLean, who agreed to play the role of the personal security provider. (Tr. 1752, 1764-65) (J.A. 708.) In June 1980, Toney introduced McLean to Dimple. A $5,000 fee was negotiated and paid. (Tr. 1776, 1778-83.) Two months later, terrified and believing her life was in danger from her husband after a month of threats made by McLean's associates, Dimple paid Toney another $10,000 to continue the personal protection. (Tr. 2981-83.)

Distressed by the continuing threats, Dimple again turned to Toney, this time to ask for assistance in arranging the murder of Henry. (Tr. 1784-86.) After consulting with McLean, Toney quoted her mother-in-law a fee of $25,000. (Tr. 1787.) A few days later, Dimple paid Toney $24,400. (Tr. 1791-94.)

Toney, the state's principal witness against O'Neal, testifed in exchange for a reduced sentence and admitted she would lie to stay out of prison. (Tr. 2120, 2126-27, 2351-53.) Toney claimed to have contacted and invited O'Neal to join the conspiracy. (Tr. 1807-08.) The plan, according to Toney, was to lure Henry to Cleveland, kidnap him, loot his Chicago residence and business,

drug him, and then release him safely in Chicago. (Tr. 1840-44.) In January 1981, the plan was put into action. Dimple lured her husband to Cleveland on the pretext of reconciling their marriage. (Tr. 1842.) According to Toney, she picked up Henry at the airport and drove him to O'Neal's saloon. (Tr. 1842, 1858) (J.A. 13-14.) Toney testified she dropped off Henry and watched him enter the saloon. Within minutes, according to Toney, O'Neal exited the saloon and gave her Henry's valuables. (Tr. 1859) (J.A. 14-15.)

Toney then began the process of looting the Podborny residence and business. (Tr. 1869-1906, 1915-18, 1928-29, 1935-37.) In February 1981, the plan began to unravel when the FBI arrested McLean for forging Henry's traveler's checks. (Tr. 3279-82.) McLean told the FBI that he had information concerning the disappearance of Henry and agreed to cooperate. (Tr. 3002.) Wearing a wire, McLean contacted Toney and discussed her and Gary Gabbard's (Toney's brother) participation in the kidnapping and robbery of Henry. (Tr. 4783-90.) No mention was made of O'Neal. (Tr. 3240-41.)

On April 24, 1981, Henry's body was found in a vacant lot in Cleveland, Ohio. (Tr. 4489-90.) He had been struck five times in the head with a blunt instrument and shot in the forehead. (Tr. 3708-09.) The assistant coroner testified that a date and time of death could not be accurately determined, but Henry " . . . had been dead for a period of at least weeks." (Tr. 3711) (J.A. 26.)

During the course of O'Neal's trial, the prosecutor improperly introduced evidence that O'Neal had been involved in a prior killing in which a man was shot in the head, (J.A. 139-51, 209-210), and numerous gruesome exhibits, including: "the actual 'smelly' clothing and

wrappings in which [Henry] was discovered; a jar containing the skin from [Henry's] left finger; a box containing scalp hair from [Henry]; and a crowbar found in O'Neal's bar." Magistrate's Report and Recommendation. (J.A. 132.) The Magistrate found that: "[T]he prosecutor introduced the gruesome evidence for the express purpose of enabling him to make an inflammatory argument at the conclusion of the case." (J.A. 151.)

During closing argument, the prosecutor made the following inflammatory argument to the jury, explaining how he wanted the jurors to use the gruesome evidence he had introduced:

> And as far as the crowbar, you pick that crowbar up, you get the dirt on your hands, you tell me about it. There is nothing on the crowbar, but when you get back there, think about what it might be like, first of all, to sit down and talk about kidnapping another human being. Get into the case. You are going to have his clothes back there. Grab those things, they stink, they've got blood on them. Wrap yourself in that blanket and see what the victim of a murder is like.
>
> MR. D'ANGELO: Objection.
>
> THE COURT: Overruled.
>
> MR. MARINO: As I said, I asked you to do this, to get into the case, to really handle this case. You can always wash up later, folks. To find out how seedy an act is, to grab a man and murder him, pick up that tire iron and ask yourselves to really take that iron yourself and hit somebody in the head five times, could you do that? Who could be a murderer. Who could but a man who would never – he would be crazy to kill someone with a registered gun.

(Tr. 6121-26) (J.A. 63-65.)

Immediately after the prosecutor's closing argument, the trial court improperly instructed the jury by relieving

the State of the burden of proving the intent element of each of the crimes charged. (J.A. 169-90.) For example, regarding aggravated murder, the trial court instructed:

> Purpose to kill is an element of the crime of aggravated murder. A person acts purposely when it is his specific intention to cause a certain result. It must be established in this case that at the time in question there was present in the minds of the defendant *or co-defendant or aiders and abettors*, if you so find, a specific intention to kill the decedent Henry Podborny.

(Tr. 6159) (J.A. 170) (emphasis added).

The prosecutor compounded the impact of these defective instructions by encouraging the jury to use the instructions to determine O'Neal's guilt or innocence. The Magistrate identified the prosecutor's conduct in his Report:

> MR. MARINO: Now, I fear that defense counsel gave you the impression that each defendant must commit every element of the crime to be liable (sic). That's incorrect."

(Tr. 6075.) The judge overruled an objection to the statement, thus appearing to endorse it. *Id.* The prosecutor continued:

> MR. MARINO: In the state of Ohio and in most states in my opinion we have what's called conspiracy and the judge is going to tell you about that. The State is bound to prove to a jury two things. First, that the crimes alleged have been committed. And at this point, is there any doubt in your mind that the man was kidnapped, he was robbed, he was bludgeoned and shot to death. The next thing we're bound to prove to you is that those accused of the crime participated in a criminal conduct and engaged in a course of criminal conduct which eventually led to the commission of those crimes.

> MR. MILANO: Objection. It is misstatement of the law, sir.
>
> THE COURT: Overruled.
>
> MR. MARINO: Folks, if that's a misstatement of the law, you are the second jury to hear it (referring to the trial of the codefendants).

Magistrate's Report and Recommendation. (Tr. 6075-76) (J.A. 129-30.)

During jury deliberations, the jury sent the following question to the trial court: "Can we please have a brief definition on the laws of aggravated murder?" (Tr. 6207-08) (J.A. 77.) The trial court repeated the defective instructions, and the jury returned guilty verdicts on all counts. (J.A. 77-82.)

The District Judge adopted the Magistrate's conclusion that the jury instructions and prosecutor's argument were, in the context of O'Neal's trial, constitutional errors. (J.A. 130-31, 206-09, 214.) According to the Magistrate:

> The jury was left with the impression that the State did not have to prove beyond a reasonable doubt an independent intent to commit each crime so long as it proved that each defendant was in some way involved in a conspiracy that eventually led to kidnapping, robbery, and murder.

Magistrate's Report and Recommendation. (J.A. 130.)

On the State's appeal to the Sixth Circuit, the court agreed that the prosecutor's closing argument "improperly suggested that the prosecution need not make an independent showing of intent as to each defendant in order for conspiracy liability to attach." *O'Neal*, 3 F.3d at 147 (J.A. 227.) However, the Sixth Circuit concluded that the constitutional errors resulting from the jury instructions and closing argument were harmless because " . . . all of the evidence upon which the jury could have

relied to establish [O'Neal's] guilt pointed to his guilt as a principal . . . [and] any error by the trial court pertaining to the intent of the conspirators or aiders and abettors did not injuriously influence the jury's decision to convict [O'Neal] as a principal." *Id.* (J.A. 227-28.)

SUMMARY OF ARGUMENT

I. Throughout this country's history, in both the constitutional and nonconstitutional contexts, and as a matter of common law, statutory provision, and federal rule, the burden of demonstrating that a proven error was or was not harmless has always rested with the State. *Chapman v. California*, 386 U.S. 18, 24 (1967) (constitutional errors); *Kotteakos v. United States*, 328 U.S. 750, 760-61 (1946) (nonconstitutional errors); *United States v. Olano*, 113 S. Ct. 1170, 1778 (1993) (Fed. R. Crim. P. 52(a)).

In *Brecht v. Abrahamson*, 113 S. Ct. 1710 (1993), this Court evidenced no intention to change the longstanding rule predating *Chapman* that the party that committed and stands to benefit from a proven constitutional violation has the burden of showing the violation did not affect the proceeding. What the Court did change with *Brecht* was *Chapman's* harmless error *standard*. The Court decided that the "harmless beyond a reasonable doubt" standard did not apply in federal habeas review. *Brecht*, 113 S. Ct. at 1721. Instead, the Court held that "the standard for determining whether habeas relief must be granted is whether the [constitutional] error 'had substantial and injurious effect or influence in determining the jury's verdict.' " *Id.* at 1714 (quoting *Kotteakos v. United States*, 328 U.S. at 776). The Court adopted the *Kotteakos* standard because it is "grounded in the federal harmless error rule" and "federal courts may turn to an existing body of case law to apply it." *Id.* at 1722. The

Kotteakos federal harmless error standard places the burden of proof on the issue of harmless error on the government.

The Sixth Circuit incorrectly interpreted *Brecht* to place the burden on O'Neal to prove not only that a constitutional error occurred, but also that it was not harmless. In explaining its departure from *Chapman*, the Court in *Brecht* repeatedly confined its discussion to the *standard* of proof, never purporting to change, either *Chapman's* or the longstanding pre-*Chapman* allocation of the *burden* of proof to the State. The Court's statement in *Brecht* that petitioners are not entitled to relief unless they can establish the constitutional error resulted in "actual prejudice," *Brecht*, 113 S. Ct. at 1722, is a synonym for the harmless error standard a petitioner must meet.

The concurring opinion that supplied the fifth vote for the majority in *Brecht*, as well as all the other authorities that *Brecht* identified in defining the new standard of harmlessness on habeas review, assign the burden of proof to the State. *See Kotteakos*, 328 U.S. at 760; *United States v. Lane*, 474 U.S. 438, 449 (1986). To make *Brecht's* application consistent with all the statutes, rules, and decisions it treats as authoritative, the Court must place the burden of proving harmless error on the State.

II. The Court's habeas decisions have effectuated the State's interests in finality, comity, and federalism by excluding certain issues that do not bear on guilt or innocence, *see Stone v. Powell*, 428 U.S. 465, 482 (1976), by enforcing procedural defaults, *see Wainwright v. Sykes*, 433 U.S. 72, 87-89 (1977), and by only applying constitutional rules in existence when a conviction becomes final, *see Teague v. Lane*, 489 U.S. 288, 306 (1989). At the same time, the Court's decisions have protected the reliability of the trial process by ensuring that habeas relief will be

afforded to petitioners who are innocent or would otherwise be victims of a miscarriage of justice. *Sykes*, 433 U.S. at 91; *Murray v. Carrier*, 477 U.S. 478, 496 (1986). The Court has also resisted broad-based attacks on the writ designed to eliminate from review issues that are central to the correct ascertainment of guilt. *See Jackson v. Virginia*, 443 U.S. 307 (1979); *Withrow v. Williams*, 113 S. Ct. 1745 (1993). Throughout its modern jurisprudence the Court has preserved the core function of the writ as a remedy for fundamentally unfair trials and for avoiding conviction of the innocent.

Brecht's standard of proof for harmless error sufficiently accommodates the State's interests in finality without changing the burden of proof. Habeas relief is now limited to petitioners who actually had a fundamentally unfair trial (constitutional errors had a substantial and injurious effect or influence in determining the jury's verdict, *Brecht*, 113 S. Ct. at 1722) rather than the possibility of one, as under the *Chapman* standard. *Brecht* increases the likelihood that retrials will occur only in situations where removal of the error may make a difference in the outcome. A change in the longstanding rule on the burden of proof for harmless error is unnecessary.

The central focus of the Court's jurisprudence is the writ's assurance that constitutional errors do not cause the conviction of the innocent. Giving habeas petitioners the burden to prove a constitutional error is not harmless will increase the risk of an erroneous decision and will not ensure the accuracy of convictions. Harmless error analysis speaks directly to the reliability of criminal procedures and the accuracy of their outcomes. The Court has acknowledged that harmless error analysis is inherently difficult and often speculative. *See Sullivan v. Louisiana*, 113 S. Ct. 2078, 2082 (1993); *Satterwhite v. Texas*, 486 U.S. 249, 258 (1988). Since the vast majority of habeas

petitioners proceed *pro se*, without legal training, and without access to the complete record, they are ill-equipped to bear the burden of proof. Given the imbalance between the State and most habeas petitioners, switching the harmless error burden of proof to petitioner may substantially increase the number of unremedied constitutional errors affecting the reliability of trials. Such result is inconsistent with the Court's habeas jurisprudence and with the goals of fair trials and accurate determinations of guilt or innocence.

Placing the burden of proof on petitioner is also inconsistent with current habeas practice. Petitioners now must justify they are entitled to relief when they procedurally default their claims. Likewise, the equitable nature of habeas practice should require that once the petitioner establishes the State has violated his constitutional rights, the State should bear the burden of proving its violation was harmless. Moreover, harmless error is an issue normally pleaded by the State to avoid the consequences of constitutional violations, similar to the other habeas defenses of non-exhaustion, non-retroactivity, procedural default, and abuse of the writ. Further, the State has access to the complete record and is better positioned to identify the salient facts and arguments on the harmless error issue.

More importantly, shifting the harmless error burden to petitioner could drastically increase the federal courts' workload. If showing prejudice becomes a part of a habeas petitioner's burden, it could drastically increase the length, complexity, and time required to plead, brief, argue, and decide habeas cases. This issue would be addressed as to all claims in all cases throughout the habeas proceedings. Efficiency counsels that the burden remains a part of the State's case. Finally, the *Kotteakos* body of case law (allocating the burden of proof on

harmless error to the State) will be of no value to the habeas court if the burden is allocated to the petitioner.

The considerations of finality, comity, and federalism do not support a change in the current burden of proof. When habeas petitioners have established constitutional violations, the State's interests have been accommodated. *See McCleskey v. Zant*, 499 U.S. 467 (1991). Requiring habeas petitioners to initially establish prejudice to obtain relief, the same as petitioners who procedurally default their claims, would not only be inequitable, but would deprive the Court's jurisprudence of a rational uniformity. The State does not have a valid interest in the finality of a conviction if there has not been a reliable determination of guilt. *See Stone*, 428 U.S. at 491 n.31. Requiring a petitioner to prove a constitutional error harmless will not ensure the accuracy of convictions or avoid conviction of the innocent.

III. For these reasons, the burden of proving a constitutional error was harmless error must be placed on the State. Because the Sixth Circuit erroneously placed the harmless burden on O'Neal, this case must be remanded to the Sixth Circuit for harmless error review. Since the impact of *Brecht* was not briefed in the Sixth Circuit before O'Neal's case was decided, a remand will afford the parties an opportunity to submit their best arguments before the court conducts its harmless error analysis. Principles of due process and fair procedure require no less. *See Lankford v. Idaho*, 500 U.S. 110, 126 n.22 (1991).

With a fair allocation of the burden to the State, O'Neal is entitled to habeas relief because the constitutionally defective jury instructions, coupled with the prosecutorial misconduct, did have a substantial and injurious effect on the jury verdict. In finding the constitutional errors harmless, the Sixth Circuit failed to consider the following critical items: (1) the impact of the

improper transferred intent instructions on the defense's theory of actual innocence; (2) the evidence that did not neatly fit within the State's theory of O'Neal's guilt as a principal, but did fit within the State's alternative theory that O'Neal could be convicted as an aider and abettor lacking any intent to kill; (3) the wide range of errors and prosecutorial misconduct at O'Neal's trial that made the jury prone to use the defective instructions to convict; and (4) the evidence that the defective, unconstitutional jury instructions and the prosecutor's improper argument confused the jury.

ARGUMENT

I. *BRECHT V. ABRAHAMSON*, 113 S. CT. 1710 (1993), DID NOT CHANGE THE LONGSTANDING RULE THAT THE PARTY THAT COMMITTED AND STANDS TO BENEFIT FROM A PROVEN CONSTITUTIONAL VIOLATION HAS THE BURDEN OF SHOWING THE VIOLATION DID NOT AFFECT THE PROCEEDING.

A. The Nature Of Harmless Error Analysis Has Long Been Understood To Require Allocating The Burden Of Proof To The State.

A federal court's habeas corpus jurisdiction is invoked when a petition is filed on behalf of a person who is held in state custody in violation of the Constitution, laws or treaties of the United States. 28 U.S.C. § 2254(a). The federal court must dismiss the petition unless it reveals on its face that the prisoner is entitled to relief. Rule 4, Rules Governing Section 2254 Cases in the United States District Courts (hereinafter Rules Governing Section 2254 Cases). To obtain relief a petitioner must prove that the State has committed a constitutional error. Only at this point does the question of harmless error arise. "[H]armless error analysis is triggered only *after* the

reviewing court discovers that an error had been committed." *Lockhart v. Fretwell*, 113 S. Ct. 838, 842 n.2 (1993); *accord Greer v. Miller*, 483 U.S. 756, 761 n.3 (1987).

The burden of proving harmless error has historically rested with the party that benefited from the error.[1] In *Chapman v. California*, 386 U.S. 18, 22 (1967), this Court held for the first time that some constitutional errors may be harmless, *i.e.*, may have little or no effect on the outcome of the trial.[2] The Court recognized, however, that constitutional errors "affect[ing] substantial rights" of a defendant cannot be harmless. *Id.* at 23. The Court recognized as well that, in fairness, the State should bear the burden of proving the error it committed was harmless:

> Certainly error, constitutional error, in illegally admitting highly prejudicial evidence or comments, casts on someone other than the person prejudiced by it a burden to show that it was harmless.

Id. at 24. As the *Chapman* Court noted, the same equitable considerations had prompted the allocation of the burden of proof to the wrongdoer under the original common-law harmless error rule:

> It is for that reason that the original common-law harmless-error rule put the burden on the beneficiary of the error either to prove that there was no injury or to suffer a reversal of his erroneously obtained judgment.

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[1] *See* Brief for Timothy Scott Sherman as *Amicus Curiae* in Support of Petitioner, Section 1.

[2] Prior to *Chapman* a constitutional violation resulted in an automatic new trial. *Payne v. Arkansas*, 356 U.S. 560 (1958); *Spano v. New York*, 360 U.S. 315 (1959); *Lynumn v. Illinois*, 372 U.S. 528 (1963); *Haynes v. Washington*, 373 U.S. 503 (1963); *Miranda v. Arizona*, 384 U.S. 436 (1966).

Id. (citing 1 Wigmore, Evidence § 21 (3d ed. 1940).[3] The Court therefore held that the beneficiary of the constitutional error must prove beyond a reasonable doubt that the error complained of did not contribute to the verdict. *Id.*

Nearly two decades before *Chapman*, the Court had interpreted the federal harmless error statute governing nonconstitutional error to place the burden of proving any substantial, or "non-technical," error harmless on the government. *Kotteakos v. United States*, 328 U.S. 750, 760-61 (1946). Just last term, nearly three decades after *Chapman*, the Court confirmed that the burden of proving harmlessness under Federal Rule of Criminal Procedure 52(a) falls on the government. *United States v. Olano*, 113 S. Ct. 1770, 1778 (1993). Throughout this country's history, therefore, in both the constitutional and nonconstitutional contexts and as a matter of common law, statutory provision, and federal rule, the burden of demonstrating that a proven error was or was not harmless has always rested with the State. *Chapman*, 386 U.S. at 24.

Justice Blackmun summarized the Court's harmless error history concisely:

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[3] The Court has followed this equitable rule in civil cases where there is evidence a party has violated the other party's constitutional rights. *See Keyes v. School District No. 1*, 413 U.S. 189, 208 (1973) (*prima facie* case of unlawful segregrative design on part of school authorities shifts to those authorities the burden of proving that other segregrated schools within the system are not also the result of intentionally segregrative actions); *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 772 (1976) ("petitioners here have carried their burden of demonstrating the existence of a discriminatory hiring pattern and practice by the respondents and, therefore, the burden will be upon respondents to prove that individuals who reapply were not in fact victims of previous hiring discrimination.").

> Every harmless-error standard that this Court has employed, however, shares two salient features. [First,] once serious error has been identified, the burden shifts to the beneficiary of the error to show that the conviction was not tainted.

Darden v. Wainwright, 477 U.S. 168, 197 (1986) (Blackmun, J., dissenting) (citations omitted).

B. Although *Brecht* Changed *Chapman's* Harmless Error Standard, It Evidenced No Intention To Change The Longstanding Rule, Predating *Chapman*, That Gives The Proven Wrongdoer The Burden Of Proving Harmlessness.

Prior to *Brecht v. Abrahamson*, 113 S. Ct. 1710 (1993), *Chapman's* "harmless beyond a reasonable doubt" standard of harmless error was applied in federal habeas cases. *See, e.g., Rose v. Clark*, 478 U.S. 570, 576 (1986); *Hopper v. Evans*, 456 U.S. 605, 613-14 (1982). In *Brecht*, the Court decided that the "harmless beyond a reasonable doubt" standard did not apply in federal habeas review. *Id.* at 1721. Instead, the Court held that "the standard for determining whether habeas relief must be granted is whether the [constitutional] error 'had substantial and injurious effect or influence in determining the jury's verdict.' " *Id.* at 1714 (quoting *Kotteakos*, 328 U.S. at 776). The Court adopted this harmless error standard from its decision in *Kotteakos*, which since 1946 had governed harmless error analysis for nonconstitutional errors under the federal harmless error statute. Id. at 1718. In explaining its departure from *Chapman*, the Court repeatedly confined its discussion to the *standard* of proof, never purporting to change either *Chapman's* or the longstanding pre-*Chapman* allocation of the *burden* of proof to the State:

> The imbalance of the costs and benefits of applying the *Chapman* harmless-error *standard*

> on collateral review counsels in favor of applying a less onerous *standard* on habeas review of constitutional error. The *Kotteakos standard*, we believe, fills the bill. The test under *Kotteakos* is whether the error "had substantial and injurious effect or influence in determining the jury's verdict." 328 U.S., at 776, 66 S. Ct., at 1253. Under this *standard*, habeas petitioners may obtain plenary review of their constitutional claims, but they are not entitled to habeas relief based on trial error unless they can establish that it resulted in "actual prejudice." See *United States v. Lane*, 474 U.S. 438, 449, 106 S. Ct. 725, 732, 88 L.Ed.2d 814 (1986). The *Kotteakos standard* is thus better tailored to the nature and purpose of collateral review, and more likely to promote the considerations underlying our recent habeas cases.

Brecht, 113 S. Ct. at 1721-22 (emphasis added).

The Sixth Circuit in this case interpreted the above passage in *Brecht* to mean that O'Neal had the burden of proving not only that a constitutional violation occurred but also that it was not harmless. *O'Neal*, 3 F.3d at 145. (J.A. 221.) This interpretation is incorrect, for several reasons. First, the only issue before the Court in *Brecht* was whether the *Chapman* harmless error *standard* applies in habeas cases. *Brecht*, 113 S. Ct. at 1713-14. This was the only issue on which the Court granted review and the only issue the Court undertook to address and decide. *See id.* at 1721-22. Although *Brecht* reprised both the *Chapman* standard of proof and *Chapman's* allocation to the State of the burden of proof, *id.* at 1717, it confined its holding to the standard, and not the burden, of proof. *Id.* at 1717-18. Thus, the burden of proof issue was not decided. *See Edelman v. Jordan*, 415 U.S. 651, 670-71 (1974) (constitutional claims are not decided until fully explored and

considered). At most, the Sixth Circuit's interpretation relies on a *dictum* in *Brecht*.

Second, although *Chapman* defined the standard of harmlessness that the Court modified in *Brecht*, *Chapman* was not responsible for allocating the burden of proving harmlessness to the State. That allocation had long predated *Chapman*, so more than a change in *Chapman* would be needed to revise the allocation of the burden of proof to the State. Yet, to the extent the *Brecht* Court addressed pre-*Chapman* practice, *e.g.*, in *Kotteakos*, it *endorsed* that practice. *See, e.g., Brecht*, 113 S. Ct. at 1718, 1721-22 (adopting *Kotteakos* standard).

Third, the Court's statement that petitioners "are not entitled to habeas relief based on trial error unless they can establish that it resulted in 'actual prejudice,' " *id.* at 1722, does not create a burden of proof, even in *dicta*. *See Elder v. Holloway*, 114 S. Ct. 1019, 1022-23 (1994) (lower court erred in interpreting language in prior Supreme Court decision, which said that plaintiffs had to make a particular "showing," as giving plaintiffs the burden of making the showing; in fact, the language simply described the legal standard the courts were to apply). The quoted language from *Brecht* can just as easily be read as a statement of the traditional principle that habeas petitioners bear the burden of establishing constitutional violations that withstand analysis under the harmless error (or synonymously, the "actual prejudice") standard that applies.[4] Given this noncontroversial interpretation, there is simply no basis for ascribing to this

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[4] The Court's use of the term "actual prejudice" adds no support to the court of appeals' controversial construction. Both the cited case, *Lane*, 474 U.S. at 449, and the Court's decision last term in *Olano*, 113 S. Ct. at 1778, make clear that, in this context, "actual prejudice" is simply a synonym for harmless error analysis. Indeed, the cited passage in *Lane* applies both *Kotteakos* and

passage the exceedingly controversial sea change in pre-existing law that the court of appeals thought it saw there.

Finally, as will be shown below, all of the authorities that *Brecht* cited in support of this passage, and particularly the *Kotteakos* decision from which the Court adopted its new habeas corpus standard, assign the burden of proof to the State. The Court in *Brecht* therefore evidenced no intention to change this longstanding rule.

C. Not Only The Concurring Opinion That Supplied The Fifth Vote For The Majority In *Brecht*, But Also All The Authorities That *Brecht* Identified As Authoritative In Defining The New Standard Of Harmlessness On Habeas, Assign The Burden Of Proof To The State.

Justice Stevens's vote was necessary to make a majority for Chief Justice Rehnquist's lead opinion in *Brecht*. In his concurring opinion, Justice Stevens stated that he joined the Court's opinion adopting the rule of *Kotteakos* precisely because *Kotteakos* places the burden of proving an error to be harmless squarely on the prosecution:

> Because [the *Kotteakos*] standard accords with the statutory rule for reviewing other trial errors that affect substantial rights; *places the burden on prosecutors to explain why those errors were harmless;* requires a habeas court to review the entire record *de novo* in determining whether the error influenced the jury's deliberations; and leaves considerable latitude for the exercise of judgment by federal courts, I am convinced that our answer is correct. I write separately only to emphasize that the standard is appropriately demanding.

Federal Rule of Criminal Procedure 52(a), both of which give the state the burden of proving harmlessness. *See I.C, infra.*

Brecht, 113 S. Ct. at 1723 (Stevens, J., concurring) (emphasis added); *accord id.* at 1723-24 ("*Kotteakos* plainly stated that unless an error is merely 'technical,' the burden of sustaining a verdict by demonstrating that the error was harmless rests on the prosecution," and "[a] constitutional violation, of course, would never fall in the 'technical' category.").

Justice Stevens's analysis of *Kotteakos* is correct. As *Brecht* noted, *id.* at 1718, the *Kotteakos* standard is based on the federal harmless error statute, now codified in 28 U.S.C. § 2111: "On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."[5] Interpreting the predecessor statute, the *Kotteakos* Court distinguished technical errors from errors affecting substantial rights. As to merely technical errors, i.e., errors unrelated to the rights of litigants,[6] the burden is upon the defendant seeking a new trial to show the error affected his substantial rights. *Kotteakos*, 328 U.S. at 760. On the other hand, where a violation affects any nontechnical right, *i.e.*, a right that is intended for the protection of litigants, *Kotteakos* puts the burden of demonstrating harmlessness upon the State:

> If the error is of such a character that its natural effect is to prejudice a litigant's substantial rights, the burden of sustaining a verdict will,

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[5] *Kotteakos* construed Section 2111's predecessor, 28 U.S.C. § 391, but as *Brecht* recognized, Congress left untouched the phrase "affect substantial rights of the parties." *Id.* at n.7. Thus, "Section 2111 did not alter the basis for the harmless error standard announced in *Kotteakos.*" *Id.*

[6] *See Bruno v. United States*, 308 U.S. 287, 293-94 (1939) (technical errors concern the "mere etiquette" and "formalities" of trials and procedure).

> notwithstanding this legislation rest upon the one who claims under it.

Id. at 760-61.

In adopting the *Kotteakos* standard for harmless error, the *Brecht* Court also cited *United States v. Lane*, 474 U.S. 438, 449 (1986). *Brecht*, 113 S. Ct. at 1722. In *Lane*, the Court interpreted Federal Rule of Criminal Procedure 52(a),[7] the harmless error rule, in considering a defendant's misjoinder claim. *Lane*, 474 U.S. at 444. The Court noted that Rule 52(a) focuses on whether the error "affect[ed] substantial rights" and that the Court had construed a harmless error statute with similar language in *Kotteakos*. *Id.* at 449. Then, in the very passage this Court cited in *Brecht*, the *Lane*, Court applied the *Kotteakos* standard in interpreting Rule 52(a):

> Invoking the *Kotteakos* test, we hold that an error involving misjoinder "affects substantial rights" and requires reversal only if the misjoinder results in actual prejudice because it "had substantial and injurious effect or influence in determining the jury's verdict."

Lane, 474 U.S. at 449. (quoting *Kotteakos*, 328 U.S. at 776).

The *Brecht* Court's citation of this passage from *Lane* supports O'Neal's argument that the State bears the burden of proving harmlessness in three separate ways. First, the passage from *Lane* treats *Kotteakos* as authoritative, and, as shown above, *Kotteakos* gave the government the burden of proof on the nontechnical and constitutional error under consideration there. Second, the cited passage in *Lane* additionally makes Criminal Rule 52(a) authoritative; and, in *Olano*, 113 S. Ct. at 1777-78, the

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[7] Rule 52(a) provides: "*Harmless Error.* Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."

Court squarely reaffirmed that the government bears the burden of proving harmlessness under Rule 52(a) (as opposed to plain error, under Rule 52(b), which the defendant must prove). Third, the cited passage from *Lane* makes clear that the term "actual prejudice," on which the court below relied, has nothing to do with any allocation of a burden of proof to the petitioner. Instead it is simply a shorthand for the *Kotteakos standard* of proof, i.e., for an error that "had substantial and injurious effect or influence in determining the jury's verdict." *Lane*, 474 U.S. at 449.

Brecht further indicated it was adopting the *Kotteakos* standard because it is "grounded in the federal harmless-error rule" and "federal courts may turn to an existing body of case law in applying it." *Brecht*, 113 S. Ct. at 1722. As shown above, the *Kotteakos* federal harmless error standard places the burden of proof on the issue of harmless error on the government.

To make *Brecht's* application consistent with all the statutes, rules, and decisions that it treats as authoritative, this Court must place the burden of proving harmless error on the State.

II. THE STATE MUST BEAR THE BURDEN OF PROVING A CONSTITUTIONAL ERROR HARMLESS IN A FEDERAL HABEAS PROCEEDING TO ENSURE THE ACCURACY OF CONVICTIONS AND TO PRESERVE THE ESSENTIAL FUNCTION OF HABEAS CORPUS AS A REMEDY FOR CONSTITUTIONAL VIOLATIONS THAT RENDER A TRIAL FUNDAMENTALLY UNFAIR.

A. The Court's Modern Habeas Corpus Jurisprudence Balances The Competing Policies Of Protecting The Reliability Of The Trial Process And Effectuating The State's Interest In Finality, Comity, And Federalism.

This Court's modern habeas corpus jurisprudence has balanced two competing policies. On one hand, the

writ of habeas corpus is a fundamental safeguard against unlawful custody. *Fay v. Noia*, 372 U.S. 391, 449 (1963) (Harlan, J., dissenting). In enacting the federal habeas corpus statute, 28 U.S.C. § 2254, Congress clearly expressed its intent to provide a federal forum and remedy for a violation of a state prisoner's federal constitutional rights. *Reed v. Ross*, 468 U.S. 1, 10 (1984). The independent federal courts have been described by the Court, in the words of James Madison, as the "guardians of those [constitutional] rights," *Chapman*, 386 U.S. at 21, "to protect the people from unconstitutional action." *Reed*, 468 U.S. at 10. As one of the most important grants of jurisdiction to the federal courts to perform that task, the Great Writ of Habeas Corpus "indisputably holds an honored position in our jurisprudence." *Engle v. Isaac*, 456 U.S. 107, 126 (1982). It is a "bulwark against convictions that violate fundamental fairness." *Id.*

On the other hand, in defining the scope of the modern writ, the Court has paid close attention to the competing policies of finality of convictions, comity, and federalism that are implicated when the federal courts review state judgments. *See Brecht*, 113 S. Ct. at 1719-20. In particular, the Court has sought to avoid an overly liberal allowance of the writ that would undermine the finality of state convictions, impinge on a state's sovereignty and good-faith efforts to honor constitutional rights, *id.* at 1720-21, or impose significant costs, such as problematic retrials. *Engle*, 456 U.S. at 128.

During the last two decades, this balancing process has led the Court to adjust habeas law so as to focus its remedial power on, and limit its effects on state interests to, situations in which the reliability of the trial process is threatened and there is a risk of the conviction of the innocent. Several decisions of the Court are illustrative.

In *Stone v. Powell*, 428 U.S. 465, 482 (1976), the Court determined that Fourth Amendment search and seizure claims were not cognizable in federal habeas proceedings when there was a full and fair opportunity to litigate them in the state courts. The Court found the benefits of applying the exclusionary rule on collateral review, i.e., deterrence, did not outweigh the costs to the system of excluding reliable evidence and often freeing the guilty. *Id.* at 489-90. Although the Court validated broad habeas corpus relief as an additional safeguard against the conviction of the innocent, *id.* at 491 n.31, it stressed that a petitioner's Fourth Amendment claims actually deflect the truth-finding process, *id.* at 490, and have "no bearing on the basic justice of his incarceration." *Id.* at 491-492 n. 31.

In *Wainwright v. Sykes*, 433 U.S. 72 (1977), a petitioner failed to comply with a state procedural rule in raising a constitutional claim in state court. The Court held this default constituted an adequate and independent state ground for the state courts' refusal to hear his claim, which barred habeas corpus relief. Because the petitioner was at fault for not respecting the State's rules and the State's interest in curing its own errors, the Court held that he could not obtain habeas relief unless he could meet the extenuating burden of showing "cause" for the procedural default and "prejudice" therefrom. *Id.* at 87-89; *accord Engle*, 456 U.S. at 129 (1982); *Murray v. Carrier*, 477 U.S. 478, 489 (1986); *Coleman v. Thompson*, 111 S. Ct. 2546, 2565 (1991); *see also Keeney v. Tamayo-Reyes*, 112 S. Ct. 1715, 1719-20 (1992) ("cause and prejudice" standard applicable to petitioner's failure to develop material fact in state court proceedings); *McCleskey v. Zant*, 499 U.S. 467, 490 (1991) ("cause and prejudice" standard applies to determine if there has been an abuse of the writ through inexcusable neglect).

Nevertheless, the Court in *Sykes* and subsequent cases held that this rule will not prevent a habeas court from hearing the claim of a petitioner who would otherwise be a victim of a "miscarriage of justice." *Sykes*, 433 U.S. at 91; *Engle*, 456 U.S. at 135; *Coleman*, 111 S. Ct. at 2565. "Where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default." *Murray*, 477 U.S. at 496.

These goals were further expressed in *Teague v. Lane*, 489 U.S. 288 (1989), where the petitioner sought to establish a new rule of constitutional law in federal habeas proceedings. This Court denied relief, finding that the "[a]pplication of constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the operation of our criminal justice system." *Id.* at 309. In reaching this conclusion, however, the Court was careful to create an exception for new rules or procedures that were "central to an accurate determination of innocence or guilt." *Id.* at 313. Throughout its modern jurisprudence, therefore, the Court has emphasized the importance of the writ in protecting the reliability and accuracy of the trial process and avoiding the conviction of the innocent.

At the same time, the Court has resisted broad-based attacks on the writ that would seriously impair its important functions. This is especially true when, unlike in *Sykes*, the petitioner has adhered to all state and federal procedural rules and has met a heavy burden of establishing that the State has violated important constitutional norms. For example, in *Withrow v. Williams*, 113 S. Ct. 1745 (1993), the Court was asked to extend *Stone* to bar habeas relief for violations of *Miranda v. Arizona*, 384 U.S. 436 (1966). The Court refused to do so because, unlike the Fourth Amendment exclusionary rule, *Miranda* safeguards "a fundamental trial right," *i.e.*, a defendant's Fifth Amendment privilege against self-incrimination,

which often helps to achieve the "correct ascertainment of guilt." *Withrow*, 113 S. Ct. at 1753. *See also Jackson v. Virginia*, 443 U.S. 307 (1979) (Court refused to apply *Stone* to Fourteenth Amendment due process claim that evidence was insufficient to support the conviction, stressing that the issue was "central to the basic question of guilt or innocence," *id.* at 323); *Kimmelman v. Morrison*, 477 U.S. 365 (1986) (Court refused to apply *Stone* to claims of ineffective assistance of counsel, recognizing that the Sixth Amendment right to counsel is a fundamental trial right that "assures the fairness, and thus the legitimacy, of our adversary process," *id.* at 374); *Withrow*, 113 S. Ct. at 1757 (O'Connor, J., dissenting) (a prisoner's equitable interest in avoiding incarceration when innocent normally is sufficient by itself "to outweigh other concerns and justify adjudication of the prisoner's constitutional claim").

Similarly, in *Wright v. West*, 112 S. Ct. 2482 (1992), the State sought to have the Court change the settled rule that "mixed constitutional questions are 'subject to plenary federal [or *de novo*] review' on habeas." *Id.* at 2491 (quoting *Miller v. Fenton*, 474 U.S. 104, 112 (1985). The State asked the Court to replace this standard with one that afforded deference to state court determinations applying law to the specific facts of a case. *West*, 112 S. Ct. at 2486. The case was decided on other grounds, but Justice Thomas acknowledged, in his plurality opinion for the Court, that such a change would be "far-reaching." *Id.* at 2492. In a concurring opinion, Justice O'Connor indicated the Court has strongly adhered to the *de novo* review of constitutional claims on habeas and "always held that the federal courts, even on habeas, have an independent obligation to say what the law is." *Id.* at 2497 (O'Connor, J., concurring). Justice O'Connor warned that a move away from this standard would be a "substantial change in our construction of the authority conferred by the habeas corpus statute." *Id.* at 2498. The following Term in *Withrow* a majority of the Court then

reaffirmed the rule of de novo review. *Withrow*, 113 S. Ct. at 1754.

Finally, in another decision last Term, *Herrera v. Collins*, 113 S. Ct. 853 (1993), the Court made clear the crucial focus of habeas corpus relief: it is not simply the interest in accurate outcomes or the interest in correcting violations of federal law, but rather the confluence of both interests. As such, even proof of a colorable claim of innocence, in the absence of any violation of federal constitutional law, could not justify relief. *Id.* at 862. The Court thus emphatically reiterated that the federal court's remedial powers on habeas are focused on "constitutional violations occurring in the course of underlying state criminal proceedings." *Id.*

The above habeas decisions preserve the core function of the writ as a remedy for fundamentally unfair trials and for avoiding conviction of the innocent. The State's interests in finality, comity, and federalism also are accommodated. To receive plenary review of a constitutional claim, a petitioner must be properly before the court. Claims brought by petitioners who have disregarded state and federal rules and cannot comply with the Court's rules regarding exhaustion, procedural default, abuse of the writ, and retroactivity are not heard.

B. *Brecht's* Standard Of Proof For Harmless Error Sufficiently Accommodates The State's Interests Without Changing The Burden Of Proof.

Prior to *Brecht*, *Chapman* required relief if there was any " 'reasonable possibility' " that constitutional trial error contributed to the verdict. *Chapman*, 386 U.S. at 24 (quoting *Fahy v. Connecticut*, 375 U.S. 85, 86-87 (1963)). In *Brecht* the Court determined that habeas relief requires more certainty of harm to assure that the petitioner has been "grievously wronged" – the historic standard for granting habeas relief. *Brecht*, 113 S. Ct. at 1721. The Court therefore adopted the more forgiving *Kotteakos*

standard, which requires relief only if the error "had substantial and injurious effect or influence in determining the jury's verdict." *Id.* at 1722 (quoting *Kotteakos*, 328 U.S. at 776).

The *Brecht/Kotteakos* standard sufficiently satisfies the state's interest in finality. The *Brecht/Kotteakos* standard denies relief for errors having no substantial impact on the jury's deliberations and verdict. Relief is limited to petitioners who *actually* had a fundamentally unfair trial. Once the court reaches this degree of certitude that constitutional error causing prejudice actually occurred, a petitioner has been "grievously wronged." The historic habeas standard for relief has been met. The State's interest in finality is no longer decisive.

The *Brecht/Kotteakos* standard also adequately addresses the "social costs" involved in retrying defendants, such as "erosion of memory" or "dispersion of witnesses," *Brecht*, 113 S. Ct. at 1721, making reconviction on retrial more difficult. *Id.* Under the *Chapman* standard, there was a greater risk, due to these factors, that a defendant would be acquitted even though he deserved to be convicted. *See McCleskey v. Zant*, 499 U.S. at 491 ("[w]hen a habeas petitioner succeeds in obtaining a new trial the 'erosion of memory' and 'dispersion of witnesses' that occur with the passage of time prejudice the government and diminish the chances of a reliable adjudication." (quoting *Kuhlmann v. Wilson*, 477 U.S. 436, 453 (1986) (plurality opinion)). *Brecht* solved this problem by limiting habeas reversals to cases where the constitutional error actually affected, in a substantial and injurious way, the outcome of the trial. Under the *Brecht/Kotteakos* standard, therefore, there will be a high probability that any new outcome on retrial is a function of curing the constitutional error, and not a product of the staleness of evidence.

The *Brecht/Kotteakos* standard sufficiently accommodates the State's interest in finality. A change in the longstanding rule on the burden of proof regarding harmless error is therefore unnecessary and unwarranted. Moreover, as demonstrated below, it will undermine the important function of the writ in protecting the reliability of the trial process and avoiding conviction of the innocent.

C. Giving Petitioners The Burden To Prove A Constitutional Error Is Not Harmless Will Increase The Risk Of An Erroneous Decision By The Habeas Court And Not Ensure The Accuracy Of Convictions.

Under the Sixth Circuit's ruling, O'Neal not only had the burden of establishing the constitutional error, but also had the burden of proving it was not harmless. *O'Neal*, 3 F.3d at 145. (J.A. 221.) Such a major change in federal habeas law is unwise, unsound, and inconsistent with the Court's recent habeas jurisprudence. This change will create the substantial risk that inaccurate convictions, including those of actually innocent people, will be preserved.

As developed above, the central focus of this Court's modern habeas jurisprudence is the writ's assurance that constitutional errors do not cause the conviction of an actually innocent person. *Stone*, 428 U.S. at 491-92 n.31; *Teague*, 489 U.S. at 312-13; *Brecht*, 113 S. Ct. at 1729 (O'Connor, J., dissenting). In *Desist v. United States*, 394 U.S. 244 (1969), Justice Harlan stated one of the principal functions of the writ of habeas corpus is " . . . to assure that no man has been incarcerated under a procedure which creates an impermissibly large risk that the innocent will be convicted." *Id.* at 262 (Harlan, J., dissenting); *see also Teague*, 489 U.S. at 313 ("Since Mackey [*Mackey v. United States*, 401 U.S. 667 (1971)] was decided, our cases

have moved in the direction of reaffirming the relevance of the likely accuracy of convictions in determining the available scope of habeas review."). This view of habeas is, of course, consistent with the often stated principle that the central purpose of a trial is to decide the question of guilt or innocence. *Stone*, 428 U.S. at 490; *Rose v. Clark*, 478 U.S. at 577.

Harmless error analysis speaks directly to this central question of the reliability of criminal procedures and the accuracy of their outcomes. When a court conducts a harmless error analysis after finding constitutional error, it must quantitatively assess the error in the context of the other evidence to determine the effect it had on the fact-finding process at the trial. *Brecht*, 113 S. Ct. at 1717 (citing *Arizona v. Fulminante*, 499 U.S. 279, 281 (1991)); *accord Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986). As this Court recognized in *Van Arsdall*:

> The harmless-error doctrine recognizes the principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence, and promotes public respect for the criminal process by focusing on the underlying fairness of the trial . . .

Id. at 681 (citations omitted); *accord Fulminante*, 449 U.S. at 308 (Rehnquist, C.J. concurring). Thus, the harmless error standard and its proper application are "crucial to our faith in the accuracy of the outcome." *Brecht*, 113 S. Ct. at 1730 (O'Connor, J., dissenting); *see Lane*, 474 U.S. at 478 (Stevens, J., concurring and dissenting) ("A determination that an error was harmless is an extremely weighty conclusion; it implicates profound notions of fairness and justice."); R. Traynor, *The Riddle of Harmless Error* 80 (1970) ("[T]he evaluation of an error as harmless or prejudicial is one of the most significant tasks of an appellate court, as well as one of the most complex.").

In *Brecht*, 113 S. Ct. at 1722, the Court reduced the standard for finding a constitutional error to be harmless in a federal habeas proceeding. No longer will the State have to prove beyond a reasonable doubt that there is no reasonable possibility that the constitutional error contributed to the verdict. *Id.* at 1721; *see Chapman*, 386 U.S. at 24. Instead, habeas relief will only be granted where the error "had substantial and injurious effect or influence in determining the jury's verdict." *Brecht*, 113 S. Ct. at 1722 (quoting *Kotteakos*, 328 U.S. at 776). No less than four Justices of the Court dissented from the Court's departure from the *Chapman* standard. *See Brecht*, at 1725-32 (White, Blackmun, Souter, O'Connor, JJ., dissenting). Substantial doubts thus have been raised whether the new standard can adequately protect federal constitutional rights. Justice O'Connor specifically found that the new standard "increases the likelihood that a conviction will be preserved despite an error that actually affected the reliability of the trial." *Id.* at 1730 (O'Connor, J., dissenting).

As the 5-4 vote and the dissenters' concerns suggest, the balance struck in *Brecht* was delicate. As O'Neal demonstrates below, tipping the balance even further against the redress of proven constitutional errors by giving the petitioner the burden on the harmless error issue will skew the balance. It will increase the risk of preserving the conviction despite constitutional error that affected the reliability of the result.

This Court has frequently acknowledged that harmless error review is inherently difficult. *See, e.g., Sullivan v. Louisiana*, 113 S. Ct. 2078, 2082 (1993) (misdescription of the burden of proof vitiates jury's findings, and reviewing court can only engage in pure speculation of what a reasonable jury would have done); *Riggins v. Nevada*, 112 S. Ct. 1810, 1816 (1992) (guesses as to outcome of trial if

defendant had not been forcibly medicated would be purely speculative); *Satterwhite v. Texas*, 486 U.S. 249, 258 (1988) (evaluation of consequences of an error in sentencing phase of a capital case may be more difficult because of discretion given to the sentencer). *See also United States v. Cerro*, 775 F.2d 908, 915 (7th Cir. 1985) (("It is always perilous to speculate on what the effect of evidence improperly admitted was on a jury, or what the effect of evidence improperly excluded would have been.") (citing Jeitelbaum, Sutton-Barbere and Johnson, *Evaluating the Prejudicial Effect of Evidence; Can Judges Identify the Impact of Improper Evidence on Juries?* 1983 Wis. L. Rev. 1147)); Traynor, *Supra*, at 29 ("It is not always easy to answer the [harmless error] question in the light or the dark of a trial."); *Kotteakos*, 328 U.S. at 764 ("The crucial thing is the impact of the thing done wrong on the minds of other men, not on one's own, in the total setting."); *Cf. Satterwhite*, 486 U.S. 256; *Riggins*, 112 S. Ct. at 1816; *Olano*, 113 S. Ct. at 1780-81 (all recognizing that in some situations harmless error analysis becomes so speculative as to be impossible). As stated by Chief Justice Rehnquist in his concurring opinion in *Sullivan*:

> In the typical case, of course, a jury does not make explicit factual findings; rather it simply renders a general verdict on the question of guilt or innocence. Thus, although it may be possible to conclude from the jury's verdict that it has found a predicate fact (or facts), the reviewing court is usually left only with the record developed at trial to determine whether it is possible to say beyond a reasonable doubt that the error did not contribute to the jury's verdict. *Moreover, any time an appellate court conducts harmless-error review it necessarily engages in some speculation as to the jury's decisionmaking process; for in the end no judge can know for certain what factors led to the jury's verdict.*

113 S. Ct. at 2084 (citations omitted) (emphasis added).

Given the inherent difficulty of harmless error analysis, the vast majority of habeas petitioners are ill-equipped to bear the burden of proof on the issue. It is well known that most federal habeas petitioners are unrepresented by counsel. *See Price v. Johnston*, 334 U.S. 266, 292 (1948) ("prisoners . . . act . . . often as their own counsel in habeas corpus proceedings"); Faust, Rubenstein & Yackle, *The Great Writ In Action: Empirical Light On The Federal Habeas Corpus Debate*, 18 N.Y.U. J.L. & Soc. Change, 637, 688 (1990-91) (1973-75 and 1979-81 data) ("[M]ost petitioners filed their habeas corpus petitions pro se."). Unlike the State, which is always represented by counsel, petitioners often must prepare their own petitions and subsequent pleadings without any legal training or ability to marshal the facts and law in their favor. Additionally, prisoners frequently do not have access to the complete record in their case. *See, e.g., State ex rel. Greene v. Enright*, 63 Ohio St. 3d 729, 590 N.E.2d 1257, *cert. denied*, 113 S. Ct. 667 (1992) (*pro se* defendant on direct appeal not entitled to have trial transcript sent to him in prison so he could prepare his appellate brief). Thus, most habeas petitioners would be at a distinct disadvantage in trying to meet such a critical burden of proof.

Given the imbalance between the State and most habeas petitioners, switching the burden of proof on harmless error from the State to the petitioner may substantially increase the number of unremedied constitutional errors affecting the reliability of trials. Such a result is inconsistent with this Court's habeas jurisprudence and with the goals of fair trials and accurate determinations of guilt or innocence. This is especially so in the wake of two decades worth of decisions of this Court limiting the availability of habeas relief to petitioners who have assiduously respected state procedural rules, who have borne

the burden of proving violations of well-established constitutional norms that affect the integrity of the trial process, and who are the victims of violations that cannot be shown to lack substantial effect on the outcome. In addition, such result fails to comport with the traditional principle that "[i]n the administration of criminal justice, our society imposes almost the entire risk of error on itself." *Addington v. Texas*, 441 U.S. 418, 423-24 (1979). *See also In re Winship*, 397 U.S. 358, 364 (1970).

D. Placing The Burden Of Proof On The Petitioner Is Not Consistent With Traditional Habeas Practice And Will Burden Rather Than Assist The Court In Deciding Which Constitutional Claims Are Entitled To Relief.

Placing the burden of proving harm on the petitioner is inconsistent with traditional habeas practice and will burden, rather than assist, federal courts in deciding which claims are entitled to relief. To begin with, by the time the harmless error question arises, habeas petitioners already will have met the burden of establishing a constitutional violation. In some cases that burden will have been very great. *See, e.g., Strickland v. Washington*, 466 U.S. 668, 687 (1984) (to establish claim of ineffective assistance of counsel petitioner must show counsel violated essential duty to client and reasonable likelihood result of trial would have been different). As the Court's procedural default rules illustrate, see *II.A, supra*, once a party has demonstrated that the other party has not played by the established rules (in this case, *fundamental constitutional* rules), the burden should shift to the proven wrongdoer to show that its interests should be vindicated despite its wrongdoing. Thus, once procedural default or abuse of the writ is shown by the State, the petitioner has the burden to establish "cause" and "prejudice" to obtain habeas relief. *Sykes*, 433 U.S. at 87; *McCleskey*, 499 U.S. at

468. The equitable traditions of federal habeas practice should likewise require that once the petitioner has established that the respondent State has violated his constitutional rights, the State should bear the burden of showing its violation is harmless.

Moreover, harmless error is logically an argument or defense to be pleaded by the responding party to avoid the consequences of the proven wrongdoing. It is for this reason that courts have found the State waived the harmless error argument by failing to timely raise it. *See Amadeo v. Zant*, 486 U.S. 214, 228 (1988); *Holland v. McGinnis*, 963 F.2d 1044, 1057 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 1053 (1993). Such allocation of the burden is dictated by longstanding harmless error practice in civil, criminal, constitutional, nonconstitutional, statutory, and common law contexts. *See I.A, supra.* In addition, it is consistent with the other habeas defenses of non-exhaustion, non-retroactivity, procedural default, and abuse of the writ which must be pleaded and proved by the State. *See Granberry v. Greer*, 481 U.S. 129, 134 (1987) (exhaustion); *McCleskey*, 499 U.S. at 482 (abuse of writ); *Godinez v. Moran*, 113 S. Ct. 2680, 2685 n.8 (1993) (non-retroactivity); *Estelle v. Smith*, 451 U.S. 454, 468 n.12 (1981) (procedural default).

Furthermore, allocating the burden to petitioner is not an efficient use of scarce judicial resources. The State's attorney has access to the complete record and is the party that Congress and this Court in the habeas rules have made responsible for responding to the allegations of the petition in an answer. *See* Rule 5, Rules Governing Section 2254 Cases; *Granberry*, 481 U.S. at 132 n.5. Respondent is in a much better position to identify the salient facts and legal arguments on the harmless error issue than most habeas petitioners. This current allocation of the burden of proof assists the court in its analysis of the

harmless error issue and ultimate decision-making. *See* Rule 5, Rules Governing Section 2254 Cases, Advisory Committee Note, 28 U.S.C. § 2254 at 1122 ("[T]he return serves several important functions: it permits the court and parties to uncover quickly the disputed issues."). Putting the burden on a lay petitioner will be less likely to do so. Judicial economy and use of resources will not be promoted if the court must seek out a lay petitioner's facts and arguments on the harmless error issue. A diligent habeas court may also see the need for an evidentiary hearing or further discovery if the facts have not been adequately marshaled by the petitioner. Even when represented by counsel, the petitioner is still not in a better position to answer the *Brecht/Kotteakos* harmless error question (whether the constitutional error had a substantial impact on the verdict). The petitioner has no better access to the relevant information than the state. *See Sullivan*, 113 S. Ct. at 2084. (Rehnquist, C.J., concurring) (harmless error determination must be made from record developed at trial).

More important, shifting the burden to the petitioner could drastically increase the federal courts' workload. If a petitioner must demonstrate that the error is harmful to obtain relief, doing so might become an essential part of every petitioner's burden in habeas cases. This may create an incentive, or even, eventually, a legal requirement on the part of petitioners to demonstrate harm as to every claim in every petition. *See* Rules 2 and 4 of the Rules Governing Section 2254 Cases (petitioner bears burden of comprehensively pleading bases necessary for relief, and federal court may summarily dismiss petition for failure to do so without securing answer from State). At the least, reallocating the burden would create an incentive on the part of the respondent to demand a showing of harm at the pleading stage as to all claims.

Making harm a threshold component of every claim in every habeas petition could drastically increase the length, complexity, and time required to plead, brief, argue and decide habeas corpus cases. Giving petitioners the burden on the issue and subjecting them to dismissal if they do not comprehensively treat the issue from the outset would inevitably force petitioners to address harmless error from the outset as to *all* claims in *all* cases. For example, given a habeas petition raising ten claims, the new burden on petitioner would create the possibility of ten new discussions devoted to "harm" in the petition, the answer, the opening and responsive briefs, the oral argument, and the opinion. Moreover, each discussion of error might have to be lengthy because each would require consideration of an as yet unadjudicated error in light of the entire record. The most efficient way to deal with the harmlessness issue is not to make it a part of petitioner's case. Otherwise, it threatens to become a major aspect of every claim in every case. Instead, it should remain a part of the State's case, but *only* if the State is found to have violated the Constitution.

Finally, the *Kotteakos* body of case law will not be of assistance to the court if the allocation of the burden of proof on harmless error is changed. In *Brecht*, the Court stated that it adopted the *Kotteakos* standard so that "the federal courts may turn to a body of case law in applying it" and "[t]herefore, application of the *Kotteakos* standard is unlikely to confuse matters for habeas courts." *Brecht* 113 S. Ct. at 1722. This will not be the case if this Court changes longstanding law and practice governing who has the burden of proof on harmless error. The *Kotteakos* case law discussing the harmless error issue in the context of the State's burden of proof not only will be of no value, but will be extremely confusing to federal courts. In addition, to require habeas courts to follow a different

procedure for analyzing harmless error issues in habeas proceedings than in other proceedings, such as federal postconviction proceedings, will contribute to erroneous decision-making. Simplicity and consistency in judicial procedures strongly counsel against a change in the traditional burden of proof on harmless error.

E. Considerations Of Finality, Comity, And Federalism Do Not Support A Change In The Current Burden of Proof Procedure.

Placing the burden of proof of harmlessness on petitioners who have established constitutional violations will not advance the interests of finality, comity, and federalism. These petitioners are properly before the court. They have exhausted their state remedies. They have not procedurally defaulted their claims in either the state or federal courts. They have not abused the writ. They have borne the burden of proving constitutional error. Moreover, under *Brecht*, they cannot obtain habeas relief if it is shown that the constitutional error had no substantial impact on the outcome of the trial. Under such circumstances, the interests of finality, comity, and federalism have been fully accommodated. *See McCleskey*, 499 U.S. at 492-93 ("The federal writ of habeas corpus overrides all these considerations, essential as they are to the rule of law, when a petitioner raises a meritorious constitutional claim in a proper manner in a habeas petition.").

Piling on petitioners the additional burden imposed by the court below thus is unnecessary in terms of the State's interest. Worse, the effect of that proposed burden would be to undermine the equitable force and prudential effect of the Court's procedural default and abuse of the writ doctrines. It would treat all petitioners as if they have procedurally defaulted their claims in the state or

federal courts and thereby harmed the State's interests. If all petitioners have to prove prejudice as part of their constitutional claim, then all will essentially have to make the same showing as petitioners who have procedurally defaulted or abused their claims. *See Sykes*, 433 U.S. at 87-89 (habeas petitioners who procedurally default their constitutional claims in state court must show "cause" for the default and "prejudice" therefrom to obtain relief); *McCleskey*, 499 U.S. at 468 (same burden as to "abused" claims).

This proposed subjection of all petitioners to a burden now reserved for those who have procedurally defaulted in the state or federal courts not only is unfair, it also deprives the Court's habeas jurisprudence of a rational uniformity by according the same treatment to petitioners who the Court has long recognized are *not* similarly situated. *See Keeney*, 112 S. Ct. at 1720 (application of cause-and-prejudice standards to habeas petitioner's failure to develop material fact in state court proceedings "advances uniformity in the law of habeas corpus"). *Cf. Olano*, 113 U.S. at 1178 (under the federal criminal rules the government has the burden of proving a properly preserved error was harmless; the defendant only bears the burden of proof on the prejudice issue when he has procedurally defaulted or forfeited the claim and must claim plain error (Rule 52(b)). Giving all, rather than only defaulted, petitioners a burden of proving prejudice could undermine the incentives the Court's default and abuse doctrines give petitioners to obey state and federal procedural rules.

Moreover, the State has no valid interest in the finality of a conviction if there has not been a fair trial and a reliable determination of guilt. Indeed, the Court in *Stone* expressly excluded constitutional claims bearing on guilt

or innocence from other habeas claims that impinge upon a state's interest in finality, comity, and federalism:

> Resort to habeas corpus, *especially for purposes other than to assure that no innocent person suffers an unconstitutional loss of liberty*, results in serious intrusions on values important to our system of government.
>
> . . . .
>
> We nevertheless afford broad relief, recognizing the need in a free society for an *additional safeguard against compelling an innocent man to suffer an unconstitutional loss of liberty*.

Stone, 428 U.S. at 491-92 n.31 (emphasis added).

It is true there are costs to the system, such as problematic retrials, when habeas relief is granted. *Engle*, 456 U.S. at 128. These costs are, however, the inevitable consequence of three factors that, in our system, *require* relief *notwithstanding* its costs: (1) having superior federal constitutional law that governs state criminal proceedings in order to safeguard important individual liberties; (2) a state's demonstrated violation of that law that has not been shown to lack substantial effect; and (3) a federal statute adopted 127 years ago that requires federal habeas corpus relief in the event of a constitutional violation. 28 U.S.C. § 2254. As this Court has recognized, these costs are "an acceptable and necessary consequence when an error in the first proceeding has deprived a defendant of a fair determination of the issue of guilt or innocence." *United States v. Mechanik*, 475 U.S. 66, 72 (1986). It is important to remember, however, these costs are incurred in only few cases where defendants' trials were fundamentally unfair. *Brecht*, 113 S. Ct. at 1719; *see also Estelle v. McGuire*, 112 S. Ct. 475, 482 (1991) ((" 'We have defined the category of infractions that violate fundamental fairness very narrowly.' ") quoting *Dowling v. United States*, 493 U.S. 342, 352 (1990)).

Finally, as pointed out above, see *II.B, supra,* the *Brecht* standard requires more certainty that the error adversely affected the jury's verdict than the *Chapman* standard. By doing so, the Court has increased the likelihood that retrials will occur only in situations where removal of the error may make a difference in the outcome. No further adjustment in habeas law is necessary to accommodate the State's interest in finality.

Requiring a petitioner to prove a constitutional error harmless would not ensure the accuracy of convictions or avoid conviction of the innocent. It would not permit the writ to serve as a remedy for those errors that violate fundamental fairness, constitute a miscarriage of justice, and are an extreme malfunction in the state criminal justice system. *See Brecht,* 113 S. Ct. at 1719-20. Rather, it would remove any guarantee that the writ would issue under such egregious circumstances, and thereby remove the federal courts as the "guardians of the people's federal rights." *See Reed,* 468 U.S. at 10.

III. BECAUSE THE SIXTH CIRCUIT ERRONEOUSLY PLACED THE BURDEN OF PROVING THE CONSTITUTIONAL VIOLATION WAS NOT HARMLESS ON O'NEAL, THIS CASE SHOULD BE REMANDED TO THE SIXTH CIRCUIT FOR HARMLESS ERROR ANALYSIS.

A. The Sixth Circuit Decided This Case Without The Benefit Of Briefing On The Impact Of *Brecht.*

Brecht v. Abrahamson did not change the longstanding rule that the party who committed and stands to benefit from a proven constitutional violation has the burden of showing that the violation did not affect the proceeding. Sixth Circuit law prior to, and after *Brecht,* placed the burden on the prosecution. *See Sherley v. Seabold,* 929 F.2d

272 (6th Cir. 1991) and *Stoner v. Sowders,* 997 F.2d. 209, 213 (6th Cir. 1993).

Because *Brecht* was announced while *O'Neal* was pending before the Sixth Circuit and after the parties' briefs had been filed, the appellate court did not have the benefit of the parties' analysis and reasoning in reaching its decision to place the burden on the habeas petitioner. Offering no analysis for its interpretation of *Brecht,* the Sixth Circuit abruptly changed existing law and erroneously placed the burden of proving the constitutional violation was not harmless on O'Neal. *O'Neal,* 3 F.3d at 147 (J.A. 221.) For this reason, O'Neal's case should be remanded to the Sixth Circuit for harmless error analysis with the burden placed on the prosecution. Remand would afford the parties an opportunity to submit their best arguments before the court conducts its harmless error analysis. Principles of due process and fair procedure require no less. *See Lankford v. Idaho,* 500 U.S. 110, 126 n.22 (1991) ("In a variety of contexts, our cases have repeatedly emphasized the importance of giving the parties sufficient notice to enable them to identify the issues on which a decision may turn."). Furthermore, this Court's general practice not to conduct harmless error analysis on the facts of a particular case, *Rose v. Clark,* 478 U.S. 570 (1986), and the extraordinary length (over 6200 pages) of the trial transcript strongly militate in favor of remand.[8]

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[8] Even if this Court determines the burden of proving the constitutional violation was not harmless was correctly placed on O'Neal, this case should be remanded to afford O'Neal an opportunity to satisfy the burden.

B. Under A Fair Allocation Of The Burden To The State, O'Neal Is Entitled To Habeas Relief.

The Magistrate and District Court in this case concluded that the trial court's jury instructions, in combination with the prosecutor's closing argument, unconstitutionally relieved the state of its burden of proving that O'Neal not only intended to participate in a conspiracy to kidnap and rob Henry, but also intended to kill him. (J.A. 130-31, 206-09, 214.)[9] Nonetheless, after giving O'Neal the burden of proving harm, the Sixth Circuit found these constitutional violations harmless because: (1) the record contained sufficient evidence of O'Neal's guilt; and (2) " . . . all of the evidence upon which the jury could have relied to establish petitioner's guilt pointed to his guilt as a principal." *O'Neal*, 3 F.3d. at 147. (J.A. 227.) Neither reason is sound. Indeed, given the dearth of proof in this record that O'Neal had the requisite intent, the Sixth Circuit's erroneous allocation of the burden of proving harmlessness has led to precisely the kind of error that habeas corpus was designed to correct – the affirmance of a constitutionally tainted conviction of one who may well be innocent of the offense.

This case was not as simple as the Sixth Circuit's Opinion suggests, for five reasons. First, the fact that the remaining evidence may be sufficient to support a conviction does not make the error harmless under the rule of *Brecht* and *Kotteakos*. *Brecht*, 113 S. Ct. at 1724 (Stevens, J., concurring).

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[9] For example, regarding the intent element of aggravated murder, the trial court instructed the jury that it must be established that "at the time in question there was present in the mind of the defendants *or co-defendants or aiders and abettors*, if you so find, a specific intention to kill the decedent Henry Podborny." (Tr. 6159) (J.A. 170) (emphasis added).

> If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand . . . But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. *The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand.*

Kotteakos, 328 U.S. at 764-65 (emphasis added).

Second, the appellate court failed to consider the impact of the improper transferred intent instructions, (J.A. 169-190), on the defense's theory of actual innocence. The physical evidence and all the testimonial evidence save Toney's (given in return for a reduced sentence) was consistent with the defense theory that Toney and her brother, Gabbard, with or possibly without the help of Waress, killed Henry at O'Neal's saloon without O'Neal's knowledge, and that O'Neal's participation, if any, in the conspiracy did not include an intent to kill Henry. (Tr. 3227-30, 5840-43.)[10] Toney told the other conspirators about O'Neal; O'Neal was not part of their discussions. (Tr. 2062, 2065, 2071, 3069, 3222-23, 3232,

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[10] The day after Henry disappeared, Toney told McLean that she and her brother had taken Henry to Gabbard's home in Amherst, Ohio to hold him a few days. (Tr. 2989.) Toney also told McLean that Henry was moved later from Amherst to Cleveland. (Tr. 3233-34.) It is possible that Henry was later taken to O'Neal's saloon and killed. Henry's date of death could not be determined. (Tr. 3712.)

3240-41, 5177, 5249.) Under the constitutionally defective instructions, however, O'Neal could have been found guilty of murder based on the mental state of Toney or Gabbard as long as O'Neal played some part in the balance of the conspiracy.

Moreover, there is ample evidence in the record of O'Neal's actions that do not reveal any homicidal or even criminal intent, but nevertheless may have furthered the conspiracy of Toney and Gabbard, and may have qualified O'Neal for conviction under the defective instructions and prosecutorial argument. For example, there was evidence that O'Neal: (1) provided Dimple with protection during her divorce by traveling with her to Chicago[11] (Tr. 4837-39, 4870); (2) attempted to help Toney invest $6,500 of the money she received from Dimple for attempting to kill Henry (Tr. 4024-32, 4042-44, 4841, 4885-86) (J.A. 47-48); (3) gave Toney, his employee, the keys to his saloon, where Toney and others secreted and killed Henry (Tr. 4900, 4952); and loaned Toney his .38 caliber Smith and Wesson handgun. (Tr. 4878-79.) The defective transferred intent instructions, coupled with the prosecutor's improper closing argument, would have confused and led any rational juror to impute Toney's criminal responsibility to O'Neal without proof of O'Neal's mental culpability or involvement in the actual robbery, kidnapping, and murder of Henry. As the Magistrate found:

> The jury had substantial credibility issues to resolve. The improper instructions on state of mind could have led the jury to convict even if

[11] The jury could have found O'Neal guilty because he assisted Toney when he protected Dimple on the Chicago trip. The prosecutor's closing argument also implied that O'Neal was guilty solely due to the trip to Chicago, since he provided Dimple with protection. (Tr. 6094-95) (J.A. 62-63.)

they believed O'Neal's version of events, on the basis that O'Neal had been involved in a conspiracy to obtain money from either Mrs. or Mr. Podborny that eventually led to kidnapping, robbery and murder. See discussion *supra* pp. 18-24 [J.A. 123-31]. The impartial atmosphere in which the jury should have resolved these issues was destroyed by the needless introduction of gruesome evidence, the prosecutor's inflammatory argument regarding said evidence, the prosecutor's improperly establishing that O'Neal had previously killed a person by shooting him in the head with his revolver, and by the prosecutor's improperly suggesting that the previous killing was credible evidence that O'Neal was guilty of Podborny's murder. Additionally, the prosecutor intentionally deprived O'Neal of jurors of his own race to help determine his guilt. We find it impossible to conclude that these factors "pale into relative insignificance" in the face of the record evidence of O'Neal's guilt. . . .

> For all these reasons, we conclude O'Neal did not receive a fair trial.

Magistrate's Report and Recommendation (J.A. 160-62) (citation omitted).

Third, the Sixth Circuit unfairly ignored the above evidence that did not neatly fit within the State's theory of O'Neal's guilt as a principal, but did fit within the State's alternative theory that O'Neal could be convicted as an aider and abettor lacking any intent to kill. The Sixth Circuit ignored the very evidence to which the prosecutor pointedly referred in his comments inviting the jury to convict O'Neal whether or not he intended the

victim to be killed. (Tr. 6075-76) (J.A. 58-59.)[12] As stated by the Magistrate:

> The jury was left with the impression that the State did not have to prove beyond a reasonable doubt an independent intent to commit each crime so long as it proved that each defendant was in some way involved in a conspiracy that eventually led to kidnapping, robbery, and murder.

Magistrate's Report and Recommendation (J.A. 130.)

Fourth, the Sixth Circuit also failed to consider how the wide range of errors and prosecutorial misconduct at O'Neal's trial made the jury prone to use the defective instructions to convict O'Neal.[13] The prosecutor did not seek to have the jury methodically and rationally evaluate the testimony and evidence. Instead, the prosecutor intentionally introduced evidence of an unrelated shooting and pleaded to the emotions and passions of the jurors through gruesome evidence. (J.A. 150-51, 209-10.) The Magistrate recognized that the prosecutor deliberately sought to have the jury abandon its impartiality in weighing the evidence:

> The prosecutor's improper conduct in eliciting the details of O'Neal's killing another man was calculated, highly prejudicial and extensive. *See Id.* at 30-39 [J.A. 139-50]. The introduction of gruesome evidence, coupled with the prosecutor's inflammatory remarks regarding such evidence, was also prejudicial and was done for the

[12] Even though the state identified Toney, Allen, O'Neal and Dimple as principals, (Tr. 6107-08), the jury was instructed on aiding and abetting. (Tr. 6159-61) (J.A. 170-71.)

[13] O'Neal's prosecutor has also engaged in misconduct in other cases. *See* Brief of *Amici Curiae* The National and Ohio Associations of Criminal Defense Lawyers In Support Of Petitioner, 7 n.1.

> express purpose of inflaming the jury's passions. *See id.* at 28-30, 39-40 [J.A. 135-39, 148-51]. It is likely that these errors, which were effectively endorsed by the trial judge, caused the jury to abandon its impartiality in weighing the evidence. Although the evidence against O'Neal was substantial, it was not overwhelming and there were substantial credibility issues for the jury to resolve. *Id.* at 47-48 [J.A. 159-61]. Accordingly, we conclude that the prosecutor's misconduct and the erroneous admission of inflammatory evidence, taken as a whole and within the context of the entire record, deprived O'Neal of a fundamentally fair trial.

Supplemental Report and Recommendation (J.A. 209-10.)

Finally, the appellate court did not consider that the defective, unconstitutional jury instructions and the prosecutor's improper argument confused the jury. After deliberating for some time, the jury asked, "Can we please have a brief definition on the laws of aggravated murder?" (Tr. 6207-08) (J.A. 77.) In reply, the trial court compounded the error by repeating the constitutionally defective intent instructions. (Tr. 6208-15) (J.A. 77-82.) As a result, the jury, emotionally disposed against O'Neal by the prosecutor's intentionally inflammatory tactics, decided O'Neal's fate without the proper legal tools to complete its task.

With a fair allocation of the burden of proof to the State, O'Neal is entitled to habeas relief because the defective jury instructions, coupled with the prosecutorial misconduct, did have a substantial and injurious effect on the jury verdict.

CONCLUSION

For the foregoing reasons, Petitioner Robert O'Neal requests the judgment of the United States Court of Appeals for the Sixth Circuit be reversed and his case remanded to that court to determine whether or not the State can demonstrate that the constitutional errors were harmless.

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RULES

Federal Rule of Criminal Procedure 52 provides:

"(a) HARMLESS ERROR. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

"(b) PLAIN ERROR. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

RULE 2, RULES GOVERNING § 2254 CASES

Rule 2. Petition

(a) Applicants in present custody. If the applicant is presently in custody pursuant to the state judgment in question, the application shall be in the form of a petition for a writ of habeas corpus in which the state officer having custody of the applicant shall be named as respondent.

(b) Applicants subject to future custody. If the applicant is not presently in custody pursuant to the state judgment against which he seeks relief but may be subject to such custody in the future, the application shall be in the form of a petition for a writ of habeas corpus with an added prayer for appropriate relief against the judgment which he seeks to attack. In such a case the officer having present custody of the applicant and the attorney general of the state in which the judgment which he seeks to attack was entered shall each be named as respondents.

(c) Form of petition. The petition shall be in substantially the form annexed to these rules, except that any district court may by local rule require that petitions filed with it shall be in a form prescribed by the local rule. Blank petitions in the prescribed form shall be made available without charge by the clerk of the district court to applicants upon their request. It shall specify all the grounds for relief which are available to the petitioner and of which he has or by the exercise of reasonable diligence should have knowledge and shall set forth in summary form the facts supporting each of the grounds thus specified. It shall also state the relief requested. The

petition shall be typewritten or legibly handwritten and shall be signed under penalty of perjury by the petitioner.

(d) Petition to be directed to judgments of one court only. A petition shall be limited to the assertion of a claim for relief against the judgment or judgments of a single state court (sitting in a county or other appropriate political subdivision). If a petitioner desires to attack the validity of the judgments of two or more state courts under which he is in custody or may be subject to future custody, as the case may be, he shall do so by separate petitions.

(e) Return of insufficient petition. If a petition received by the clerk of the district court does not substantially comply with the requirements of rule 2 or rule 3, it may be returned to the petitioner, if a judge of the court so directs, together with a statement of the reason for its return. The clerk shall retain a copy of the petition.

RULE 4, RULES GOVERNING § 2254 CASES

Rule 4. Preliminary Consideration by Judge

The original petition shall be presented promptly to a judge of the district court in accordance with the procedure of the court for the assignment of its business. The petition shall be examined promptly by the judge to whom it is assigned. If it plainly appears from the face the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the district court, the judge shall make an order for its summary dismissal and cause the petitioner to be notified. Otherwise the judge shall order the respondent to file an answer or other pleading within the period of time fixed by the court or to take such other action as the judge deems appropriate. In every case a copy of the petition and any order shall be served by certified mail on the respondent and the attorney general of the state involved.

RULE 5, RULES GOVERNING § 2254 CASES

Rule 5. Answer; Contents

The answer shall respond to the allegations of the petition. In addition it shall state whether the petitioner has exhausted his state remedies including any post-conviction remedies available to him under the statutes or procedural rules of the state and including also his right of appeal both from the judgment of conviction and from any adverse judgment or other in the post-conviction proceeding. The answer shall indicate what transcripts (of pretrial, trial, sentencing, and post-conviction proceedings) are available, when they can be furnished, and also what proceedings have been recorded and not transcribed. There shall be attached to the answer such portions of the transcripts as the answering party deems relevant. The court on its own motion or upon request of the petitioner may order that further portions of the existing transcripts be furnished or that certain portions of the non-transcribed proceedings be transcribed and furnished. If a transcript is neither available nor procurable, a narrative summary of the evidence may be submitted. If the petitioner appealed from the judgment of conviction or from an adverse judgment or order in a post-conviction proceeding, a copy of the petitioner's brief on appeal and of the opinion of the appellate court, if any, shall also be filed by the respondent with the answer.

STATUTES

Ohio Revised Code, Section 2903.01 – Aggravated Murder

(A) No person shall purposely, and with prior calculation and design, cause the death of another.

(B) No person shall purposely cause the death of another while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or escape.

(C) Whoever violated this section is guilty of aggravated murder and shall be punished as provided in section 2929.02 of the Revised Code.

Ohio Revised Code Section 2905.01 – Kidnapping

(A) No person, by force, threat, or deception, or, in the case of a victim under the age of thirteen or mentally incompetent by any means, shall remove another from the place where he is found or restrain him of his liberty, for any of the following reasons:

(1) To hold for ransom, or as a shield or hostage;

(2) To facilitate the commission of any felony or flight thereafter;

(3) To terrorize, or to inflict serious physical harm on the victim or another;

(4) To engage in sexual activity, as defined in section 2907.01 of the Revised Code, with the victim against his will;

(5) To hinder, impede, or obstruct a function of government, or to force action or concession on the part of governmental authority.

* * *

(C) Whoever violates this section is guilty of kidnapping, a felony of the first degree. If the offender releases the victim in a safe place unharmed, kidnapping is a felony of the second degree.

Ohio Revised Code Section 2911.01 – Aggravated Robbery

(A) No person, in attempting or committing a theft offense as defined in section 2913.01 of the Revised Code, or in fleeing immediately after such attempt or offense, shall do either of the following:

(1) Have a deadly weapon or dangerous ordnance as defined in section 2923.11 of the Revised Code on or about his person or under his control;

(2) Inflict, or attempt to inflict serious physical harm on another.

(B) Whoever violates this section is guilty of aggravated robbery, a felony of the first degree.

28 U.S.C. § 391

(Repealed)

On the hearing of any appeal, certiorari, writ of error, or motion for new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties.

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28 U.S.C. § 1254

§ 1254. Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

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28 U.S.C. § 2111

§ 2111. Harmless error

On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.

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28 U.S.C. § 2243

§ 2243. Issuance of writ; return; hearing; decision

A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto.

The writ, or order to show cause shall be directed to the person having custody of the person detained. It shall be returned within three days unless for good cause additional time, not exceeding twenty days, is allowed.

The person to whom the writ or order is directed shall make a return certifying the true cause of the detention.

When the writ or order is returned a day shall be set for hearing, not more than five days after the return unless for good cause additional time is allowed.

Unless the application for the writ and the return present only issues of law the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained.

The applicant or the person detained may, under oath, deny any of the fats set forth in the return or allege any other material facts.

The return and all suggestions made against it may be amended, by leave of court, before or after being filed.

The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require.

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28 U.S.C. § 2254

§ 2254. State custody; remedies in State courts:

(a) "[A] district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." . . .